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# The Prosperity of a Jest

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# THE PROSPERITY OF A JEST

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MEN who occupy the bench are merely human. Whenever a general rule of law is harshly oppressive judges generally try to soften its rigors by creating an exception. They have done this to mitigate the severity of the statute of limitations by holding that a new promise may revive the debt, and tempered the wind to the shorn creditor in bankruptcy in the same manner. The consideration of such a promise is merely the moral obligation but, like the wound of Mercutio, it suffices.

For generations it had been considered sound law that a penal statute could not be enforced outside of the state that enacted it. This rule was generally applied to statutes making a director of a corporation that failed to file an annual report, or filed a false one, liable for its debts. It was generally held such a right of action, being for a penalty, could not be assigned, did not survive, and was outlawed in one year.*

Seymour D. Thompson, in the first edition of his work on Corporations, inveighed against this rule, claiming such a statute was not penal inasmuch as the directors failing to file a report, knowing their statutory liability therefor, impliedly agreed to pay the debts, thereby making the right of the creditor contractual. It became clear to everyone that this argument had almost unanswerable force and that if such statutes could be called something besides "penal," they would be outside of the general rule and justice might be better served.

In 1781 a case was decided in England where the owner of property sued for its destruction by a mob. It was urged that the act of parliament on which he relied was penal. Justice Buller, regarded as one of the foremost wits of the English bench, who gave the opinion, said, jocosely, that the act was "penal as to the defendant but certainly remedial as to the sufferer." *Hyde vs. Cogan,* 2 Doug. 699. Jokes by judges, in those days, as in ours, found many obsequious members of

*Chase vs. Curtis,* 113 U. S. 452; *Gregory vs. Bank,* 3 Colo. 332; *Clough vs. R. M. Oil Co.,* 25 Colo. 528; *Hazelton vs. Porter,* 17 Colo. Ap. 1.

the bar eager to be heard laughing, and this quip furnished a basis for great mirth in British legal circles. To the literal minds of English lawyers it was the same as a statement that a substance was flesh and fish. It was considered a jolly good judicial paradox.

In 1888, Colis P. Huntington attempted to enforce a judgment against Henry Y. Attrill in Canada on his liability as a director of a New York corporation for filing a false report. It was successfully contended by the defendant, that the judgment was based on a penal statute of New York, hence not sequuenter forum rei. *Huntington vs. Attrill,* 17 Ontario 285. The issue finally reached the House of Lords in England on writ of error from the Canadian Court of Appeals and there the Southern Pacific Railway lawyers (the Huntington road) first heard of the case of *Hyde vs. Cogan,* which was more than one hundred years old by that time, and the House of Lords, fond of hoary precedent in proportion to its antiquity, followed it and reversed the Canadian Court.

In 1893, another case, involving the same parties and issues, came on for hearing in the Supreme Court of the United States on writ of error from Maryland and the venerable theory of *Hyde vs. Cogan* was revived by Huntington's lawyers with such good effect that the Supreme Court of the United States cut the Gordian knot of precedent and solemnly decided in *Huntington vs. Attrill,* 146 U. S. 687, that such a statute was penal as to the director who was sued, but remedial as to the creditor who sued him, and force should be given the statute outside of the state that enacted it. Chief Justice Fuller dissented.

Seymour D. Thompson's reason seems to have been far the better, but to date a majoriy of states, including Colorado, *Credit Men's Company vs. Vickery,* 62 Colorado 214, have inclined to depart from their previous line of decision and follow the peculiar logic of *Huntington vs. Attrill,* borrowed from the merry jest of Justice Buller in *Hyde vs. Cogan,* one hundred and fifty years ago. The disturbing and

long unsettled question would seem finally to be at rest, had not the Colorado Supreme Court said in *Ahearn vs. Goble*, 90 Colorado 173, "such an action against a corporate officer (failure to file a report) is for a debt." Seymour D. Thompson's theory seems thereby fully vindicated in this state.

Justice Buller's badinage, by reason of his high station, inspired awe as it grew older and what was originally a jest finally acquired the aspects of profound wisdom. Had a Justice of the Peace given such a construction to a statute it would have seemed irresistibly funny.

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## JUDGE JOHN C. BELL

One of Colorado's pioneer lawyers, Judge John C. Bell, a former congressman and said to be the father of the National Reclamation Bureau, died at Montrose on August 12 at the age of eighty-one years. He had been failing since suffering a stroke of paralysis some three weeks prior to his death.

Judge Bell came to Colorado in 1874 and became the first county attorney of Saguache County, then moved to Lake City, where he was twice mayor. Later he moved to Montrose and was elected in 1888 as judge of the seventh judicial district. He resigned that post in 1892 after being elected to congress from the old second district.

During his five terms in congress, Bell secured appropriations for the Colorado Springs federal building, opening of the southern Ute reservation for settlement, and also appropriations for the Uncompaghre reclamation project, the latter coming some years before the reclamation bureau was formed. The present reclamation law was copied from his bill.

In 1913, Judge Bell was appointed to the Colorado Court of Appeals, which later was abolished. He served for some years on the state board of agriculture, retiring at the expiration of his term this year.

He is survived by his widow; a brother, John Bell, and two daughters, Susan Bell Nickell and Mrs. John T. Stivers, all of Montrose.